4530

No. ~~4520~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

REES T. JENKINS,

Plaintiff in Error,

vs.

J. O. BOYD, as Trustee of the Estate of McCollum-Christy Lumber Company (a corporation), Bankrupt,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of the Case.

This action is brought by the Trustee in Bankruptcy of the McCollum-Christy Lumber Company, a bankrupt corporation, for alleged conversion by the defendant (plaintiff in error) of a sawmill and its full equipment, including certain buildings, all constructed upon lands owned by the defendant, and was for alleged conversion of lumber and logs. The defendant (plaintiff in error) by his amended answer denied specifically all the allegations of the complaint, and in addition and as a separate defense, set up:

FIRST: That the defendant was the owner of the property with which he is charged with

converting, because the same had been affixed to his realty without any agreement for the removal thereof.

SECOND: That plaintiff's cause of action is barred by a former adjudication and the matter is res adjudicata.

The facts of this case are as follows:

The defendant (plaintiff in error), was the owner of lands in Plumas County, California, upon which there was, standing and growing, a large amount of merchantable timber, and he entered into a contract with one W. E. Seehorn on the 19th day of May, 1920, which contract was subsequently assigned to the McCollum-Christy Lumber Company, for which plaintiff (defendant in error) is trustee.

We quote the following from the testimony of W. E. Seehorn on page 118 of the Tr.:

> "The first agreement was made with me and I turned that to the company at a profit of $1.50 a thousand. I made something like $90,000 on that turn, on paper."

It was provided in said contract that said Seehorn should have the right and option to purchase said merchantable timber by making the following payments:

$25,000.00—June 1st, 1920,

$25,000.00—September 15th, 1920,

$50,000.00—July 1st, 1921,

and

$50,000.00—July 1st, 1922,

and interest on all deferred payments at the rate of

seven per cent per annum. (Exhibit 1, page 47, folios 40-46.)

Upon the assignment to McCollum-Christy Lumber Company of this contract, and to take the place of such assignment, a new contract was entered into and the dates of the above payments were changed as follows:

$25,000.00—July 1st, 1920,

$25,000.00—November 1st, 1920,

$50,000.00—July 1st, 1921,

and

$50,000.00—July 1st, 1922.

(Exhibit 6, page 76, folios 64-71.)

Both contracts provide:

"It is mutually agreed that in the event that the purchaser, party of the second part, shall fail to make any of the deferred payments promptly when they become due, then the party of the first part shall be relieved from any and all obligation to sell said timber, and he may retain any moneys that have been theretofore paid by second party as liquidated damages for the breach of the contract."

(Exhibit 1, page 48, folio 41.)

(Exhibit 6, page 78, folio 65.)

Both contracts contain an express provision that time was of the essence thereof.

(Exhibit 1, page 53, folio 45.)

(Exhibit 6, page 83, folios 69 and 70.)

Both contracts further provide:

"It is agreed by both parties hereto that if the purchaser, the second party, or its assigns,

shall desire to cut any of said timber before the full purchase price is paid, it or its assigns shall select and designate the particular forty (40) acres tract or tracts which it is desired to commence cutting upon, and shall pay in advance to said first party an amount equal to two dollars and fifty cents ($2.50) per thousand feet stumpage, as per the cruise in Exhibit "A" or any amendment thereof, for the forty (40) acre tract or tracts so selected and designated; said payment to be in addition to the first payment of twenty-five thousand dollars ($25,000.00) but such payments for stumpage shall be applied upon any deferred payment or payments not then due and payable."

(Exhibit 1, foot page 49, folio 42.)

(Exhibit 6, page 79, folios 66 and 67.)

Both of said contracts further provide as follows:

"Said party of the second part further agrees that at the expiration of said period of ten years, or its prior termination for any cause, it shall and will surrender to said party of the first part, his agent or attorney, peaceably and quietly the said lands and the whole thereof IN AS GOOD ORDER AND CONDITION, *reasonable use thereof and damage by the elements excepted, as the same now are* OR MAY BE HEREAFTER PUT INTO, *and not to make or suffer any waste thereof, nor lease, nor under-let, nor permit any person or persons to occupy, use or improve the same or any part thereof, excepting with the approval in writing having been first given by the said party of the first part."*

(Exhibit 1, page 53, folio 44.)

(Exhibit 6, page 82, folio 69.)

MILL AND OTHER PROPERTY AFFIXED TO JENKINS' LAND.

The sawmill and other buildings and property which defendant (plaintiff in error) is charged with converting were constructed upon his realty by the bankrupt corporation under contracts, Exhibits 1 and 6, and were affixed to the soil in the manner following:

See Testimony of W. E. Seehorn, witness for plaintiff (defendant in error) Tr. page 157, folios 128 and 129, as follows:

"It was constructed upon sills that were placed in the ground. By mill I mean mill building. The foundation was embedded in the soil. We took a big log that was five feet in diameter and squared it up and set the engine on top of these logs and the engine was set on top of that and then screws screwed it down so as to hold it in place. This log was set on top of logs that were embedded in the ground. The boiler was encased in brick. We had 18 inches of brick around the boiler to hold the heat, and an excavation made for it. I think there was a concrete foundation. The edgers and trimmer were set on the floor. They were bolted to the floor with screws. Some of them were hung from above, the shafting and all that sort of thing. They were screwed or bolted to the timbers comprising the mill. The ties for the track were laid on the top of the ground, most of them, the rails were on top of the ties. The rails were spiked together, spiked to the ties. Just the same as any other rail. Then we would move it from one track to the other. We didn't have enough to cover them all and we moved them from one to the other. The rails of the track were not attached to the mill. It ran up to the mill. The mill was

up higher. The lumber was put down on another track; there were tracks in the mill that ran out to where we sorted the lumber. The rails were laid on the floor of the mill and spiked."

BUILDINGS AND LUMBER ALL MADE FROM JENKINS' TIMBER.

The sawmill building and all other buildings and all lumber and logs with which defendant (plaintiff in error) was charged with converting were not only constructed on his lands but were constructed out of lumber manufactured from his timber and for which he had never been paid.

Testimony of W. E. Seehorn, witness for plaintiff (defendant in error), page 118 Tr. folio 97, is as follows:

"The McCollum-Christy Company never cut any timber in that country that did not come off the land of Jenkins. It was all Jenkins' timber, all the buildings, and houses and everything that was made of lumber was made from timber on Jenkins' land. When this suit was brought in Plumas County the company was in default in their payments to Jenkins. I don't know just what it was. They never did make but one payment and that was $10,000. They gave him $15,000 in stock. They owed all the payments that were due at the time the suit was brought in Plumas County."

TITLE TO TIMBER WAS IN JENKINS.

Both contracts, Exhibits 1 and 6, contain the following covenant:

"It is agreed by both parties hereto that if the purchaser, the second party, or his assigns, shall desire to cut any of said timber before the full purchase price is paid, he or his assigns, shall select and designate the particular forty (40) acre tract or tracts which it is desired to commence cutting upon, *and shall pay in advance to said first party an amount equal to two dollars and fifty cents ($2.50) per thousand feet stumpage,* as per the cruise in Exhibit 'A' or any amendment thereof, for the forty (40) acre tract or tracts so selected and designated; said payment to be in addition to the first payment of twenty-five thousand dollars ($25,000.00) but such payment for stumpage shall be applied upon any deferred payment or payments not then due and payable."

(Exhibit 1, Tr. page 49, folio 42.)

(Exhibit 6, Tr. page 79, folios 66 and 67.)

We quote from the testimony of W. E. Seehorn, Tr. page 119, folio 99:

"That 3 million feet stumpage was never paid to Jenkins so that is $12,000 that never was paid to him."

CORPORATION DEFAULTED.

According to the foregoing testimony of W. E. Seehorn the bankrupt corporation was in default in the sum of $25,000 on November 1st, 1920, and was in default in the sum of $50,000 on July 1st, 1921; a total of $75,000, and was also in default in the sum of $12,000 for timber cut and unpaid for, as provided by the contract, each of which constituted a forfeiture.

CORPORATION ABANDONED.

Earl Whitlock, who was Secretary and a director of the bankrupt corporation, on pages 151 and 152, folio 124 of the Tr. testified that he sent the following telegram to Mr. Jenkins:

"Western Union Telegram.

1922 Mar 22 PM 9 54

A417 S. F. 46 NL

Klamath Falls Org. 22

Reese T. Jenkins

Reno Nev.

Unable to get you on phone at San Francisco today Answering your wire to Merryman will say seems hopeless that anything will be done here Advise you to take your own course in matter to best protect yourself Have done all in my power but to no effect

Earl Whitlock.

(Page 141 Tr. (Defendant's Exhibit 12).)

(Folio 116.)

And he further testified as follows:

"The Board of Directors authorized me to do that. I am sure of that and I sent it as Secretary of the company."

(Tr. page 152, folio 124.)

JENKINS DECLARED FORFEITURE.

On March 23rd, 1922, Rees T. Jenkins, defendant, —(Plaintiff in error) served a notice of forfeiture on W. E. Seehorn, manager and director of the bankrupt corporation, which notice is Plaintiff's Exhibit 7, Tr. page 89, folio 75 and is as follows:

"Reno, Nevada, March 23, 1922.

To W. E. Seehorn and McCollum-Christy Lumber Company:

You and each of you are hereby notified that Rees T. Jenkins hereby elects to declare that certain agreement of date May 19, 1920, made and entered into between Rees T. Jenkins and W. E. Seehorn and by said W. E. Seehorn assigned to McCollum-Christy Lumber Company, which said agreement was for the sale of certain timber on the lands in Grizzly Valley, Squaw Valley and Last Chance Valley, in the County of Plumas, State of California, as hereby forfeited and declared terminated for the failure to perform the terms of said agreement within the time in said agreement specified, and for failure to make the payments of the sums specified in said agreement at the times and in the manner in said agreement specified.

And you are further notified that the said Rees T. Jenkins intends to immediately commence an action in the Superior Court of the County of Plumas, State of California, to declare said agreement forfeited and of no effect.

.....,

Attorney for Rees T. Jenkins."

On page 89 of the Tr. folio 77, the record shows it was admitted that this document was signed by N. J. Barry, attorney for Rees T. Jenkins.

That thereafter and on the 25th day of April, 1922, as alleged in defendant's Amended Answer on page 22 of the Tr., Paragraph 9, which was admitted by the plaintiff (defendant in error herein) Rees T. Jenkins (plaintiff in error herein) commenced an action in the Superior Court of the State

of California in and for the County of Plumas, against W. E. Seehorn and McCollum-Christy Lumber Company, a corporation, the bankrupt in this action, to declare a forfeiture of all rights of the defendants, W. E. Seehorn and McCollum-Christy Lumber Company, under said contracts and in and to the real property and the mill and other appurtenances. The action thereafter resulted in a judgment in favor of Jenkins as prayed for, which said judgment was made and entered on the 6th day of May, 1922.

(Tr. top page 74.)

Thereafter and on the 24th day of June, 1922, Rees T. Jenkins (plaintiff in error), sold the saw mill, engine and boiler, situate on said premises, to B. C. Soule as shown by the bill of sale, Plaintiff's Exhibit 3, page 57, Tr. folio 49.

The decision in the District Court was as follows (See Tr. page 42, folios 35-38):

"The case is simple enough. The facts free from material conflict, and little detail of evidence is required from a busy trial court. The contract between defendant and bankrupt created a mixed relation between them in some part that of vendor and vendee, landlord and tenant, and licensee.

To enjoy the premises exclusively for ten years growth of timber, portions likewise for mills and other facilities of enjoyment of the purchase, created a tenancy despite the negative words in the con-

tract. Terms, not labels, give character to relations.

But whether tenancy or mere license, local as well as general law attached right to remove mill and other facilities within or at end of contract period, and nothing in the contract indicates any contrary intent in the parties. In so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material.

Likewise immaterial is the question whether removal must occur *before* contract terminated or could be done *after* that time. The reason subsists in the relations between defendant and bankrupt—the former president of the latter and also owner of the land on which were mill, etc.

For his duty as president, to guard the interest of the then insolvent bankrupt—insolvency known to him, and its creditors, required that he timely cause to be removed if necessary the mill, etc. Failing to do so, he cannot take advantage of this, his wrong, and successfully assert that as owner of the land he became owner of the mill, etc. by reason of his failure to timely cause them to be removed as was his duty as aforesaid.

This is elementary and the principle is illustrated by innumerable cases, corporation and others.

So it is immaterial here whether the contract was really terminated, whether the bankrupt owes anything to defendant, or vice versa, for breach, the

duty of defendant is the same in any case. So far as time was of the essence, defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due. As before stated, no forfeiture occurred. Hence, the judgment based thereon and procured in a state court by defendant upon allegations that he had not been paid the first payment, is founded upon falsehood, collusion and fraud, and defendant will be permitted no benefit or advantage by reason of it.

See *Smith v. Smith,* 224 Fed. 3, and cases by it cited.

Incidentally the proceedings of that judgment could well be the basis of other proceedings by the state court and public prosecutor.

In respect to logs and lumber on hand, they were not counted upon in the case as brought and tried, and are not here, at least, to be taken into account.

If any of defendant's timber was converted and by labor transformed into buildings by the bankrupt, its value does not appear and no account can be taken of it. The evidence is ample that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property upon the premises and of value $50,000.

That he later executed a bill of sale that *may* exclude same, is too late, does not cure conversion, and is immaterial. The court finds for plaintiff and against defendant, in amount $50,000, legal interest from June 23, 1922, and costs, and therefrom concludes plaintiff is entitled to recover of and from defendant accordingly. If defendant desires more specific findings, plaintiff will submit them to conform hereto and no notice. So far as necessary, the amended complaint is allowed.

Judgment accordingly.
Dec. 13, 1924.

Bourquin, J.

(Endorsed): Filed Dec. 15, 1924.
Walter B. Maling, Clerk.
By J. A. Schaertzer,
Deputy Clerk."

In accordance with said decision a judgment was entered on the 15th day of December, 1924, in favor of the plaintiff (defendant in error) and against the defendant (plaintiff in error) for the sum of $58,672.22, together with costs of suit. (Tr. pages 45 and 46.)

Plaintiff in error is prosecuting this writ of error for a reversal of said decision and judgment.

THE ERRORS RELIED UPON.

The assignment of errors are severally and at length set forth in the Tr., pages 166-179.

The errors we particularly rely upon for a reversal of the judgment, and which are contained in the assignment of errors are as follows:

6. The Court erred in its opinion and decision, made and filed in said cause on the 15th day of December, 1924, in holding that the contract between defendant and bankrupt created a mixed relationship between them, in some part that of vendor and vendee, landlord and tenant and licensee, in this:

(A). The contract specifically provided that the relationship of landlord and tenant did not exist.

(B). Under the decisions of the Supreme Court of California such a contract is held to be that of vendor and vendee, and not that of landlord and tenant.

(C). That by the terms of said contract an option to purchase was created, and not the relationship of landlord and tenant.

7. The Court erred in holding in its opinion and decision that said contract created a tenancy, despite the words of the contract, in this:

(A). That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create the relationship of vendor and vendee.

(B). That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create an option to purchase, and create the relationship of optionor and optionee.

8. The Court erred in holding in its opinion and decision that the general law gave the bankrupt a

right to remove the mill and other facilities within or at the end of the contract period in this: The Statutes of the State of California provide that when one party affixes his property to the lands of another, without an agreement to remove, such property becomes the property of the owner of the land.

9. The Court erred in holding in its opinion and decision that nothing in the contract indicates any contrary intent in the parties, in this:

(A). Under the Statutes of the State of California it was the duty of the vendee to have inserted in the contract a provision for the removal of this property.

(B). The contract specifically provides that at the termination of this contract, for any cause, the property shall be returned to the vendor in as good state and condition as the same was at that time of entering into the contract, or might thereafter be put into.

9. The Court erred in its opinion and decision in holding that in so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material, in this:

(A). That the forfeiture did not depend on the default of the first payment but provided that time was of the essence of the contract, and that upon a failure to promptly comply with the conditions of the contract the vendor would be released from all obligation in law or equity to further perform the contract.

(B). The contract also provided that the property would be left in as good condition as the same was or might thereafter be put into.

(C). The Supreme Court of the State of California, in its decisions, holds that time is always of the essence of option contracts and that a failure on the part of the optionee to do any of the things called for by the contract promptly, terminates the contract and effects a forfeiture.

10. The Court erred in holding, in its opinion and decision, as immaterial the question of whether removal must occur before the contract terminated or could be done after that time, in this:

If the relationship of landlord and tenant existed as held by the Court, under the provisions of the Statutes of the State of California, the removal must be made before the termination of the tenancy.

11. The Court erred, in its opinion and decision, in holding that the reason subsists in the relations between defendant and bankrupt,—the former president of the latter and also owner of the land on which were mill, etc., in this:

(A). There is no law prohibiting the president of a corporation from contracting with the corporation if his actions be free from fraud. No fraud was alleged nor proven in this case.

(B). The law is that any officer of a corporation may deal with such corporation where he does not assume to act in his official capacity, or do anything representing the corporation in the deal but simply represents the other side of the deal, and the corporation is represented by some proper officer.

12. The Court erred, in its opinion and decision, in holding that the defendant, as president, was in

duty bound to guard the interests of the insolvent bankrupt, in this:

The testimony shows that defendant was never the acting president of the corporation, and at no time had anything to do with the management thereof, but on the contrary, shows that W. E. Seehorn was the actual manager.

13. The Court erred in holding that the insolvency of the corporation was known to the defendant, in this:

There is no testimony showing that the defendant ever knew that the corporation ever was insolvent.

14. The Court erred in holding that the defendant, as president, was required to timely cause to be removed, if necessary, the mill, etc., in this:

(A). Under the law there was no such duty on the part of the president of the corporation in this case, for the reason that he was not the acting manager of said corporation.

(B). In any case, he would have had no more right than the corporation—and the corporation, under the laws of the State of California, would have had no right to remove.

(C). The bankrupt, having failed to have inserted in the contract a clause for the removal, the mill became the property of the owner of the land, and no act of the corporation, or its president, could have changed that condition.

(D). That under the terms of the contract the mill, and other property, which was affixed to the land immediately became the property of Jenkins, the owner of the land and the corporation and its officers had no authority to

remove any of such property, or disturb the possession of Jenkins.

(E). The defendant had the same right to assert his rights, under the contract, that a mortgagee would have had.

(F). In the asserting of his rights Jenkins did not act as president of the corporation but took the matter up in his individual capacity, with the directors of the corporation.

15. The Court erred in finding that defendant could not take advantage of his own wrong and successfully assert that he had become the owner of the mill, in this:

(A). He was guilty of no wrong.

(B). He was dealing with the corporation individually and not as president.

(C). The agreement was made with the corporation at a time when Jenkins was not president.

16. The Court erred in finding that it was the duty of the defendant to timely cause the property to be removed, in this:

(A). The agreement was made with the corporation in perfect good faith and there was no dispute on this point. He, therefore, had the right to follow any remedy given him by the law, the same as though he were not president of the corporation and to assert any rights given him by the contract as an individual.

17. The Court erred in holding that it was immaterial here whether the contract was really terminated, whether the bankrupt owes anything to defendant, and that the duty of defendant is the same in any case, in this:

The above is in total disregard of the contract and the Court failed to give the contract any effect whatever. The contract defined the rights of the parties. On the breach thereof defendant was entitled to assert any rights given him under the law and the contract, and it was material to know whether or not the payments had been made, or whether or not the contract had been terminated by default, and to define defendant's right on such default.

18. The Court erred in holding that so far as time being of the essence defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due, in this:

(A). No waiver was plead nor claimed.

(B). There was no appreciable delay after default.

(C). There were no changes or modifications, or recognition of the continuance of the contract after default.

(D). Demand for payment was not a waiver of the defendant intended to declare and claim a forfeiture.

19. The Court erred in holding that the judgment in Plumas County was founded on falsehood, collusion and fraud, in this:

(A). Even though the judgment was procured upon perjured testimony it cannot be attacked in this court, but should have been attacked in the state court by motion for a new trial. The only fraud that would vitiate a judgment would be a collateral fraud in procuring the defendant in such suit to fail to appear. It is not fraud that is perpetrated upon

the trial court but is perpetrated upon a defendant to keep him from appearing in court.

(B). The findings of the Superior Court in Plumas County shows that the bankrupt was in default in a sum exceeding $50,000.

(C). The Court was in error in not giving effect to the Plumas County judgment as a bar to this proceeding for the reason that no fraud in securing the judgment in Plumas County was pleaded or proven in this case. The only fraud alleged was in letting a default be taken, and the evidence was insufficient to show any fraud in procuring such default and the testimony showed that the bankrupt had no defense to the Plumas County case.

20. The Court erred in finding that no account could be taken of the lumber and logs on hand for the reason that the value thereof was not shown by the defendant, in this:

(A). This is an action for conversion for property alleged to have been converted by the defendant. The testimony shows that everything on the lands constructed of lumber was made from the timber standing on the lands of defendant. There was no duty on defendant to show the value of the timber. It was defendant's own timber. He was the owner of it and there is no way in which its value could be material. In order to get a judgment for conversion it was incumbent upon the plaintiff to show the value of the timber, and that it was their timber.

(B). Under the decisions of the Supreme Court of the United States the timber and everything created by it belonged to the defendant until paid for. The testimony shows that there was $12,500 worth of timber cut by the bankrupt, and not paid for.

21. The Court erred in finding that the evidence was ample to show that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property on the premises to the value of $50,000, in this:

(A). The mill, under the laws of the State of California, belonged to Jenkins, it having been placed on his land without an agreement to remove it.

(B). The mill was constructed out of lumber sawed from the timber of the defendant, and for which no price was paid.

(C). Defendant did not sell anything but the mill.

(D). The testimony fails to show that defendant ever had in his possession, or exercised any dominion over, any property upon the premises other than the selling of the mill.

(E). The testimony fails to show that the trustee in bankruptcy ever made any attempt to take possession of the personal property, or the mill, or ever made any demand on the defendant, or anyone else, for any property which belonged to the bankrupt.

(F). That the mill building was permanently affixed to the soil, and that the mill machinery, boiler, engine and other equipment was permanently attached to the mill building, or to things otherwise permanently affixed to the soil, and under the statute of the State of California this made the mill, the mill machinery, boiler, engine, and equipment a part of the realty, and became the property of the defendant the instant it was so affixed, both under the law and under the contract.

(G) There was no competent testimony showing the value of any property belonging to the bankrupt.

22. The Court erred in finding for plaintiff and against defendant in amount $50,000 with legal interest from June 23, 1922, and costs, in this:

(A) There was no testimony that defendant ever converted or had in his possession any property that was the property of the plaintiff.

(B) There is no competent testimony that any property of plaintiff, involved in this action, was of the value of $50,000 or any other value.

LAW ARGUMENT.

6. The Court erred in its opinion and decision, made and filed in said cause on the 15th day of December, 1924, in holding that the contract between defendant and bankrupt created a mixed relationship between them, in some part that of vendor and vendee, landlord and tenant and licensee, in this:

(A) The contract specifically provided that the relationship of landlord and tenant did not exist.

Both contracts specifically provide that the relationship of landlord and tenant did not exist.

"It is further agreed that this agreement shall in nowise be construed as a lease of the

said lands upon which timber hereinabove described shall be standing and growing."

(Exhibit 1, page 52, folio 44.)

(Exhibit 6, page 82, folio 68.)

(B) Under the decisions of the Supreme Court of California such a contract is held to be that of vendor and vendee, and not that of landlord and tenant.

Pomeroy v. Bell, 118 Cal. 635; 50 Pac. 683.

We quote from the decision as follows on page 684 of the Pacific:

"One who enters into possession of land under an executory agreement for its purchase does not thereby become the tenant of the vendor, and is not liable for the use and occupation of the premises. 'An executory contract for the sale of land, which gives the purchaser a right to enter and possess the premises until default in payment of the purchase money, does not establish the relation of landlord and tenant where there is no reservation of rent fixed in the contract.' 12 Am. & Eng. Enc. Law 662, and cases cited."

(C) That by the terms of said contract an option to purchase was created, and not the relationship of landlord and tenant.

Pomeroy v. Bell, 118 Cal. 635; 50 Pac. 683;

White v. Bank of Hanford, 148 Cal. 552; 83 Pac. 698;

Briles v. Paulson, 170 Cal. 196; 149 Pac. 169;

Briles v. Paulson, 170 Cal. 408; 149 Pac. 804;

Compton Land Co. v. Vaughn, 33 Cal. App. 130; 164 Pac. 610.

RELATIONSHIP OF LANDLORD AND TENANT DID NOT EXIST.

7. The Court erred in holding in its opinion and decision that said contract created a tenancy, despite the words of the contract, in this:

(A) That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create the relationship of vendor and vendee.

See authorities under Subd. B of Assignment 6.

(B) That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create an option to purchase, and create the relationship of optionor and optionee.

See authorities under Subd. C of Assignment 6.

NO RIGHT TO REMOVE FIXTURES EXISTED.

8. The Court erred in holding in its opinion and decision that the general law gave the bankrupt a right to remove the mill and other facilities within or at the end of the contract period in this: The statutes of the State of California provide that when one party affixes his property to the lands of another, without an agreement to remove, such property becomes the property of the owner of the land.

Section 1013, Civil Code, State of California, reads as follows:

"FIXTURES. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it."

CONTRACTS EXPRESSLY PROVIDED AGAINST REMOVAL.

9. The Court erred in holding in its opinion and decision that nothing in the contract indicates any contrary intent in the parties, in this:

(A) Under the statutes of the State of California it was the duty of the vendee to have inserted in the contract a provision for the removal of this property.

Section 1013, Civil Code, above quoted.

Under the law this section became a part of the contract.

(B) The contract specifically provides that at the termination of this contract, *for any cause,* the property shall be returned to the vendor in as good state and condition as the same was at the time of entering into the contract, *or might thereafter be put into.*

Both contracts expressly provided that the second party (Seehorn and McCollum-Christy Lumber Company) upon the termination of said contract *"for any cause* shall and will surrender the property to defendant *in as good order and condition,* reasonable use thereof and damage by the elements

excepted, *as the same now are or may be hereafter* put into."

(Exhibit 1, Tr. page 53, folio 44.)

(Exhibit 6, Tr. page 82, folio 69.)

West Coast Lumber Company v. Apfield, 86 Cal. 335, 24 Pac. at 994;

Board of Education of San Francisco v. Grant, 118 Cal. 39, 50 Pac. 5.

We quote the following from the *West Coast Lumber Company* case on page 994 of the Pacific:

> "Again, as we have before said, there was neither a reservation of right, nor a grant of right, to remove any buildings; but, on the contrary, there was an express covenant to surrender at the expiration of the term 'in as good state and condition as reasonable use and wear thereof will permit, damage by the elements alone excepted'. This at least was an express provision negativing the right to remove."

And the following from the case of *Board of Education v. Grant,* on page 6 of the Pacific:

> "In the leases there were no stipulations, covenants, or conditions whatever as to the removal of the buildings. On the contrary, there was an express covenant in each lease by the lessee that at the expiration of the lease he would 'peaceably and quietly leave, surrender, and yield up unto the said party of the first part, her successors or assigns, all and singular, the said demised premises, reasonable use and wear thereof and damage by the elements excepted'."

These cases are particularly significant for the reason that they both arise under leases, in which the law is more liberal than under options and agreements of purchase and in the Board of Education case the lease was awarded by the Board of Supervisors by bids submitted in response to an advertisement, which advertisement contained a provision that the lessee should have the right to remove all improvements within 30 days after the expiration of the lease, but the final written lease that was entered into failed to contain such a provision, and in the face of these circumstances the Supreme Court of California held, under the above quoted provision of the lease to surrender the premises in as good state and condition, that such provision of the lease defeated the right of the tenant to remove the improvements.

The provisions of the leases in each of the above cases were not as broad as the provision in the contracts in the case at bar.

To the same effect is the case of *Shipler v. Potomac Copper Company,* (Mont.) 220 Pac. 1097 at 1100.

TIME WAS OF ESSENCE OF CONTRACT AND TERMINATED BY MERE DEFAULT.

9. The Court erred in its opinion and decision in holding that in so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material, in this:

(A) That the forfeiture did not depend on the default of the first payment but provided that time was of the essence of the contract, and that upon a failure to promptly comply with the conditions of the contract the vendor would be released from all obligation in law or equity to further perform the contract.

(Tr. page 78, folio 65, and page 83, folio 69.)

Both contracts provide as follows:

"It is mutally agreed that in the event that the purchaser, party of the second part, shall fail to make any of the deferred payments promptly when they become due, then the party of the first part shall be relieved from any and all obligation to sell said timber, and he may retain any moneys that have been theretofore paid by second party as liquidated damages for the breach of this contract."

(Exhibit 1, Tr. page 48, folio 41.)

(Exhibit 6, Tr. page 78, folio 65.)

BOTH CONTRACTS HAD AN EXPRESS PROVISION IN EXACT TERMS THAT TIME WAS OF THE ESSENCE THEREOF.

(Exhibit 1, Tr. page 53, folio 45.)

(Exhibit 6, Tr. page 83, folio 69.)

Either of the foregoing provisions of the contract was a sufficient statement, under the law, that time was of the essence thereof.

This has been so held in the following cases:

Grey v. Tubbs, 43 Cal. 364;

Clery v. Folger, 84 Cal. 316; 24 Pac. 280;

Woodruff v. Semi-Tropic Land and Water Co., 87 Cal. 275; 25 Pac. 354.

Each of the foregoing cases was cases of vendor and vendee and each of the contracts simply contained a provision that failure on the part of the vendee to make the payments punctually should relieve the vendor from all obligations to convey, and the Supreme Court of California, in each case, emphatically stated that no clearer provision could be made fixing time as of the essence.

ENTIRE CONTRACT TO BE CONSIDERED NOT MERELY ONE ISOLATED PROVISION.

As was said in the case of *Skookum Oil Company v. Thomas,* 162 Cal. 339; 123 Pac. 363, with regard to a forfeiture provision in a contract which it was contended should control the construction of the entire contract:

> "The contention is that the word 'heretofore' used in the forfeiture clause must be construed to limit the defendant's right to the $10, parenthetically referred to as 'herein paid'. The rules of construction forbid seizing upon some isolated provision of a contract in order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. Civ. Code, Secs. 1641, 1650."

The case further holds that no express right to declare a forfeiture is necessary.

Under this contract, upon a default by the purchaser, all its rights were terminated without any notice of forfeiture or termination.

Andrews v. Karl, 42 Cal. App. 513; 183 Pac. 838,

from which we quote the following from page 840 of the Pacific:

> "Where time is made of the essence of the contract, terminating it upon a failure to comply strictly and punctually with its conditions, its effect is to entail a forfeiture *by sheer* force of the contract itself, upon the mere default of the purchaser by his failure to make payments at the times and in the manner that he obligated himself to. * * *"

See also:

Silverthorne v. Simon, 59 Cal. App. 492; 211 Pac. 26 at 28.

13 *Corpus Juris* 689, last paragraph of Section 783.

> "Where time is of the essence of a contract, it is not necessary for one party to notify the other that he will treat the contract as breached if not complied with on the date specified in order to avail himself of the time stipulation."

WHERE TIME IS OF THE ESSENCE OF A CONTRACT COURTS ARE BOUND TO FOLLOW THE SAME, REGARDLESS OF THE HARSHNESS THEREOF.

Cheney v. Libby, 134 U. S. 68.

LAW DECLARES FORFEITURE UPON DEFAULT WITHOUT ANY FORFEITURE PROVISION IN CONTRACT.

No express clause of forfeiture is necessary in a contract between a vendor and vendee but upon default of the vendee, the vendor is entitled to declare a forfeiture regardless of whether or not any such provision is contained in the contract.

Glock v. Howard Wilson Co., 123 Cal. 1; 69 Am. St. Rep. 17; 43 L. R. A. 199; 55 Pac. 713;

Odd Fellows Savings Bank v. Brandor, 124 Cal. 255 at 258; 56 Pac. 1109;

Skookum Oil Co. v. Thomas, 162 Cal. 539; 123 Pac. 363;

Cross v. Mayo, 167 Cal. 594 at 606; 140 Pac. 283.

FORFEITURE—WHEN COMPLETE—IMMEDIATELY UPON DEFAULT.

The vendor, under a provision for forfeiture, has the right to consider it as complete the day following the maturity of an installment of the purchase price.

Skookum Oil Co. v. Thomas, 162 Cal. 539; 123 Pac. 363.

(B) The contract also provided that the property would be left in as good condition as the same was *or might thereafter be put into.*

(Tr. page 82, folio 69.)

This was an express agreement that the fixtures would belong to Jenkins.

See authorities under Assignment 9.

(C) The Supreme Court of the State of California, in its decisions, holds that time is always of the essence of option contracts and that a failure on the part of the optionee to do any of the things called for by the contract promptly, terminates the contract and effects a forfeiture.

Briles v. Paulson, 170 Cal. 408; 149 Pac. 804;

13 *Corpus Juris* 688.

TENANT CANNOT REMOVE FIXTURES AFTER TERMINATION OF TENANCY.

10. The Court erred in holding, in its opinion and decision, as immaterial the question of whether removal must occur before the contract terminated or could be done after that time, in this:

If the relationship of landlord and tenant existed, as held by the Court, under the provisions of the statutes of the State of California, the *removal must be made before the termination of the tenancy,* assuming that any right to remove ever existed, *which did not.*

EVEN THOUGH THE RELATION OF LANDLORD AND TENANT EXISTED THE TENANT WOULD HAVE NO RIGHT TO REMOVE THE FIXTURES AFTER THE EXPIRATION OF HIS TERM, OR AFTER HE HAD FORFEITED.

Earle v. Kelly, 21 Cal. App. 480; 132 Pac. 262 (Syll. 6);

Marks v. Ryan, 63 Cal. 107;

Merritt v. Judd, 14 Cal. 59;

Wadman v. Burke, 147 Cal. 351; 81 Pac. 1012.

The only fixtures that a tenant is entitled to remove under any conditions, except by an express contract, are what are commonly known to law as "trade fixtures" as defined by Civil Code of California, Section 1019, which section provides that trade fixtures must be removed "during the continuance of the term" and the Supreme Court of California has, at all times, held that such removal must be during the continuance of the term.

We quote the following from the case of *Earle v. Kelly,* 21 Cal. App. 480; 132 Pac. 262, from 264:

> "As to trade fixtures, it is required that the removal shall be made during the term of the tenant's estate. Decisions of our Supreme Court to this point are Marks v. Ryan, 63 Cal. 107, citing Merritt v. Judd, 14 Cal. 60; Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330."

OFFICER OF CORPORATION MAY DEAL WITH CORPORATION THE SAME AS AN OUTSIDER.

11. The Court erred, in its opinion and decision, in holding that the reason subsists in the relations between defendant and bankrupt—the former president of the latter and also owner of the land on which were mill, etc., in this:

> (A) There is no law prohibiting the president of a corporation from contracting with the corporation if his actions be free from fraud. No fraud was alleged nor proven in this case.

STOCKHOLDER MAY DEAL WITH CORPORATION IF NO FRAUD.

In the absence of a taint of fraud or other improper act a stockholder may become a creditor of the corporation.

Borland v. Haven, 13 Sawy. 551; 37 Fed. 394;

California etc. Co. v. Cuddeback, 27 Cal. App. 450; 150 Pac. 379;

Kellerman v. Maier, 116 Cal. 416; 40 Pac. 377;

10 *Cyc.* 807.

(B) The law is that any officer of a corporation may deal with such corporation where he does not assume to act in his official capacity, or do anything representing the corporation in the deal but simply represents the other side of the deal, and the corporation is represented by some proper officer.

OFFICER AND STOCKHOLDER MAY DEAL WITH CORPORATION WHEN:

It is legitimate for an officer and stockholder of a corporation to deal with such corporation where he does not assume to act in his official capacity, or do anything representing the corporation in the deal, but simply represents the other side of the deal and the corporation is represented by some proper officer, and his vote is not necessary as a

member of the corporation. This may be done where he sells land to the corporation.

Calif. etc. Co. v. Cuddeback, 27 Cal. App. 45; 150 Pac. 379;

Porter v. Lassen County Company, 127 Cal. 261; 59 Pac. 563;

Schnittger v. Old Home Mining Co., 144 Cal. 603; 78 Pac. 9.

We quote the following syllabus from the *Cuddeback* case, 150 Pac. 380:

"Corporations—Officers—Contracts—Validity.

The rule that a contract between a corporation and its director may be avoided by the corporation, and the money paid by it to the director may be recovered at its option, applies only where the director's conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction, and where his official action is an essential part of the corporate action."

"Corporations—Purchase of Land—Validity.

Where a corporation was represented by its president and general manager with authority to purchase land, and he purchased land from a director and a third person, and the director did not act for the corporation in selling to it the land, and he and the third person received in good faith the money paid by the corporation and the transaction was untainted with fraud, the contract could not be avoided by the corporation."

We quote the following from the case of *Schnittger v. Old Home Mining Co.,* at page 10 of the Pacific:

"'The mere fact that the creditor was a director of the company does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation from making contracts with it like any other individual, and when the contract is made the director stands as to the contract in the relation of a stranger to the corporation.' Stratton v. Allen, 16 N. J. Eq. 229. Mr. Thompson says (3 Thompson on Corp., Sec. 2068): 'We therefore find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor; but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith.' See, also, Taylor on Corp., Sec. 634: Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Sutter St. R. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749."

JENKINS DID NOT REPRESENT CORPORATION.

There is no testimony in the case, and no pretense by anyone, that Jenkins pretended or assumed to represent the corporation in the making of either of the agreements. At the time the first agreement was made there was no corporation. The agreement

was made with Seehorn alone. At the time of the making of the second agreement, which took the place of the first, Jenkins did not represent the corporation. The agreement is signed by Jenkins as party of the first part and by the corporation through W. E. Seehorn, as vice-president. (Tr. top page 84, folio 70.)

OFFICER OF CORPORATION HAS SAME RIGHTS TO ENFORCE CLAIM AS ANYONE ELSE.

"In enforcing his claim against the corporation a director *or officer* may employ the same methods as are open to other creditors."

14a *Corpus Juris* 135;

Hutchinson v. Phil. S. S. Co., 216 Fed. 795;

Kittel v. Augusta R. Co., 84 Fed. 386.

JENKINS NOT ACTIVE PRESIDENT—TOOK NO PART IN CORPORATION.

12. The Court erred, in its opinion and decision, in holding that the defendant, as president, was in duty bound to guard the interests of the insolvent bankrupt, in this:

The testimony shows that defendant was never the acting president of the corporation, and at no time had anything to do with the management thereof, but on the contrary, shows that W. E. Seehorn was the actual manager.

See Tr. page 117, folio 97—testimony of W. E. Seehorn:

> "Jenkins never signed any pay checks. He never did sign any checks. He paid the watchman. That was all he ever paid and that was quite a while after he had made the sale to Soule. I attended to signing the checks in 1921. As I stated about this superintendent, he was hired by the directors. I had the management outside one man. After we got rid of him I had *the full management.*"

Testimony of Jenkins, page 85, folio 71:

> "I never did any act that was done as president of the company. I could not tell you who was the president of the company. Mr. Seehorn was the man I dealt with. I paid no attention as to what was going on as to the management of the company at all."

Testimony of Earl Whitlock, Tr. page 150, folio 122:

> "To my knowledge Mr. Jenkins was never a director of that corporation. I am sure he was not. He took no active part as president. Mr. Seehorn was managing the business, ever since a former employee had been discharged."

PRESIDENT HAS NO POWERS OR DUTIES EXCEPT THOSE SPECIALLY CONFERRED—NONE WERE CONFERRED ON JENKINS.

We quote the following from 14A Corpus Juris, page 93, Section 1858:

> "Aside from his position as presiding officer of the board of directors and of the stockholders

when convened in general meeting, the president of a corporation has by virtue of his office, merely, no greater power than that of any director. Whatever authority he has must be expressly conferred on him by statute, charter, or by-law or the board of directors or be implied from express powers granted, usage or custom or the nature of the company's business."

BOARD OF DIRECTORS AND GENERAL MANAGER RUN CORPORATION.

And again in Section 1862, page 94 of 14A Corpus Juris is the following:

"The general manaer of a corporation has general charge, direction, and control of the affairs of the company for the carrying on of which it was incorporated. He is to be distinguished from a person who has the management of some particular branch of the business. While it is said that he is virtually the corporation itself and that his implied powers are coextensive with the general scope of the business of the corporation, yet the ultimate control rests with the board of directors. The office of general manager is of broader import than that of president."

BOARD OF DIRECTORS ABANDONED CONTRACT.

It is shown by the testimony that the Board of Directors abandoned the contract and wired Jenkins (plaintiff in error) to go ahead and take such steps as he might deem best to protect his individual rights.

See testimony of Earl Whitlock, secretary of the corporation, at the foot of page 151, and the top of page 152 as follows:

> "I sent this telegram to Jenkins in 1922. I couldn't tell you the date. I haven't seen the telegram:
>
> Counsel for plaintiff thereupon read the telegram to the witness as follows:
>
> 'Unable to get you on phone at San Francisco today. Answering your wire to Merryman will say seems hopeless that anything will be done here. Advise you take your own course in matter to best protect yourself. Have done all in my power but to no effect.
>
> EARL WHITLOCK'.
>
> That sounds like the wire. The Board of Directors authorized me to do that, I am sure of that, and I sent it as secretary of the company."

ABANDONMENT—WHAT AMOUNTS TO.

"The refusal of one party to perform his contract amounts, on his part, to an abandonment of it."

Hicks v. Lovell, 64 Cal. 14; 27 Pac. 942, quoting from: *Graves v. White,* 87 N. Y. 465.

REMEDY OF VENDOR UPON ABANDONMENT BY VENDEE.

Upon abandonment by the vendee or refusal to perform the vendor has a choice of remedies: He may stand upon his contract, refusing assent to his adversary's attempt to rescind it *and sue for a breach;* or in a proper case for a specific perform-

ance, or, he may assent to its abandonment and so effect dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original possession.

Hicks v. Lovell, 64 Cal. 14; 27 Pac. 942, quoting from: *Graves v. White,* 87 N. Y. 465.

ABANDONMENT OF FORFEITURE OF CONTRACT—VENDEE IN POSSESSION BECOMES A TRESPASSER OR TENANT AT WILL.

Upon the abandonment or forfeiture of the contract, the vendee, if he is in possession, thereon becomes a trespasser or tenant at will and the vendor may sue in ejectment.

Whittier v. Stege, 61 Cal. at 241.

INSOLVENCY COULD NOT DEFEAT RIGHTS OF JENKINS.

13. The Court erred in holding that the insolvency of the corporation was known to the defendant, in this:

There is no word of testimony in this record showing that Jenkins ever knew anything of the business affairs of the corporation, or that he ever knew it was insolvent.

In addition to this the question of insolvency of the corporation could not in any manner affect or alter the rights of Jenkins, which rights had long previously been fixed by the contracts, which were

entered into one before the corporation was formed and with an individual, and the second with the corporation at a time when it was not insolvent.

TRUSTEE STANDS IN SHOES OF BANKRUPT AND IS SUCCESSOR IN INTEREST OF BANKRUPT AND HOLDS ONLY THE TITLE OF THE BANKRUPT.

"The trustee in bankruptcy acquires no rights additional to those possessed by the bankrupt."

Producers' Naval Stores Co. v. McAllister, 278 Fed. at 18;

Zartman v. Waterloo First Natl. Bank, 216 U. S. 134;

Bryant v. Swoffard Bros. Dry Goods Co., 214 U. S. 279 and many other U. S. and Fed. cases.

7 Corpus Juris 133, and many authorities cited, including U. S. and Fed. cases.

A right or lien or preference created more than four months before insolvency or bankruptcy proceedings is not affected by bankruptcy and may be enforced within the four months period prior to bankruptcy, or even while bankruptcy proceedings are pending.

Metcalf Bros. and Co. v. Barker, 187 U. S. 165;

Plaut v. Gorham Man. Co., 174 Fed. 852;

7 Corpus Juris, 199;

In re: McKane, 152 Fed. 733;

Producers' Naval Stores Co. v. McAllister, 278 Fed. 13 at 18;

Brown Shoe Co. v. Wynne, 281 Fed. 807;

In re: Houtman, 287 Fed. 251;

Tube City Mill Co. v. Otterson (Ariz.), 146 Pac. 203.

JENKINS OWED NO DUTY TO CORPORATION BUT COULD ASSERT HIS INDIVIDUAL RIGHTS—CORPORATION HAD NO RIGHT TO REMOVE FIXTURES.

14. The Court erred in holding that the defendant, as president, was required to timely cause to be removed, if necessary, the mill, etc., in this:

(A). Under the law there was no such duty on the part of the president of the corporation in this case, for the reason that he was not the acting manager of said corporation.

See authorities cited above under Assignment II, *ante.*

(B). In any case, he would have had no more right than the corporation—and the corporation, under the laws of the State of California, would have had no right to remove.

See authorities cited above under Assignments 8 and 9 *ante.*

(C). The bankrupt, having failed to have inserted in the contract a clause for the removal the mill became the property of the owner of the land, and no act of the corporation, or its president, could have changed that condition.

TIME WHEN CHARACTER CHANGES—INSTANILY.

Personalty so affixed to realty becomes appurtenant or fixture *eo instanti* (at the very same instant).

Tillman v. Delacy, 80 Ala. 103;

Delacy v. Tillman, 83 Ala. 155; 5 So. 294;

South Bridge Savings Bank v. Mason, 147 Mass. 500; 1 L. R. A. 350;

Sawmill, engine and boiler, fastened by bolts and nuts to timbers imbedded in the soil held part of realty.

McKiernan v. Hesse, 51 Cal. 594.

See also authorities cited under Assignments 8 and 9, *ante.*

TITLE VESTED IN JENKINS INSTANT IT WAS AFFIXED.

(D). That under the terms of the contract the mill, and other property, which was affixed to the land immediately became the property of Jenkins, the owner of the land and the corporation and its officers had no authority to remove any of such property, or disturb the possession of Jenkins.

See authorities cited under Assignment 14, Subd. C *ante.*

See also authorities cited under Assignments 8 and 9 *ante.*

(E). The defendant had the same right to assert his rights, under the contract, that a mortgagee would have had.

Under the law the defendant (plaintiff in error) had the same rights to enforce his claim as a mortgagee or any other creditor.

In re: Dayton Coal and Iron Co., 291 Fed. 390 at 402;

In re: St. Louis and Kansas Oil and Gas Co., 168 Fed. 934;

Metcalf Bros. and Co. v. Barker, 187 U. S. 165;

Plaut v. Gorham Man. Co., 174 Fed. 852.

See authorities under Assignment 11 subd. B *ante.*

(F). In the asserting of his rights Jenkins did not act as president of the corporatoin but took the matter up in his individual capacity, with the directors of the corporation.

On page 89, folio 75, Tr., it was admitted that the notice was signed by N. J. Barry, attorney for Rees T. Jenkins, and Plaintiff's Exhibit 7, commencing on page 89 shows what the notice was, and on page 89 it was admitted that the notice was served on W. E. Seehorn, and the testimony is that Seehorn was manager.

The affidavit of service, found on page 65, shows that the summons in the suit in Plumas County was served on Seehorn individually, and also served on Seehorn as resident managing agent of McCollum-Christy Lumber Company within the State of California.

Defendant's Exhibit 12, Tr., page 141, is a telegram from Earl Whitlock, secretary of the corporation, sent at the instance of the directors to Jenkins advising him to take his own course to protect himself.

See also authorities cited under Assignment 11, *ante.*

15. The Court erred in finding that defendant could not take advantage of his own wrong and successfully assert that he had become the owner of the mill, in this:

(A). He was guilty of no wrong.

(B). He was dealing with the corporation individually and not as president.

(C). The agreement was made with the corporation at a time when Jenkins was not president.

The record and authorities hereinbefore cited substantiate these assignments.

16. The Court erred in finding that it was the duty of the defendant to timely cause the property to be removed, in this:

(A). The agreement was made with the corporation in perfect good faith and there was no dispute on this point. He, therefore, had the right to follow any remedy given him by the law, the same as though he were not president of the corporation and to assert any rights given him by the contract as an individual.

See authorities cited under Assignments 11 and 12, *ante.*

Under the foregoing authorities cited under Assignments 11 and 12, *ante,* the law casts no such duty on the defendant as president, and in fact, in the absence of a showing that such duty was cast upon him by statute, charter, or by-laws of the corporation he would have no greater duty than any other director and the ultimate duty was in the Board of Directors, which Board of Directors, after a meeting held, wired him to proceed and protect his individual interests, and in addition to all this the corporation had a general manager in the person of W. E. Seehorn and the duties of the general manager, under the authorities above cited, supersede all duties of the president in respect to the management of the property.

17. The Court erred in holding that it was immaterial here whether the contract was really terminated, whether the bankrupt owes anything to defendant, and that the duty of defendant is the same in any case, in this:

> The above holding is in total disregard of the contract and the Court failed to give the contract any effect whatever. The contract defined the rights of the parties. On the breach thereof defendant was entitled to assert any rights given him under the law and the contract, and it was material to know whether or not the payment had been made, or whether or not the contract had been terminated by default, and to define defendant's right on such default.

The holding of the Court was in effect that a director or officer of a corporation has no rights

whatever under the law as against the corporation; it was in effect a holding that an officer of a corporation could not make an agreement with the corporation prior to the time that he became an officer, or director, and that he could not deal with the corporation as an individual at the time he was an officer or a director, even though he was guilty of no fraud, and even though his dealings with the corporation were perfectly straight and honest. There is not a word of testimony in this case, nor a claim anywhere that there was any fraud, or undue influence, or any self-interest asserted by Jenkins in the making of the original agreement with Seehorn, or the second contract with the corporation. The record further shows, without dispute, that Jenkins did not, in any of the transactions, or at any time attempt to represent the corporation in any capacity, but on the contrary, in all such transactions, the corporation was represented by other officials or by Seehorn as general manager.

18. The Court erred in holding that so far as time being of the essence defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due, in this:

(A). No waiver was plead nor claimed.

"The burden of proof is upon the party claiming the waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

40 *Cyc.* 269.

"The rule is that when a party relies upon the waiver of his performance of an act upon which his right of action depends, such waiver must be specifically pleaded. Jerome v. Stebbins, 14 Cal. 457; Daley v. Russ, 86 Cal. 114; 24 Pac. 867; Gillon v. Northern etc. Co. 127 Cal. 480, 59 Pac. 901; Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648; Gillett v. Burlington Ins. Co. 53 Kans. 108, 36 Pac. 52; Dwelling House Ins. Co. vs. Johnson, 47 Kans. 1; 27 Pac. 100."

Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 9 Cal. 473; 99 Pac. 537 at 540.

"A 'waiver' in law is the intentional relinquishment of a known right."

Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 9 Cal. 473; 99 Pac. 537 at 540.

(B). There was no appreciable delay after default.

(C). There were no changes or modifications, or recognition of the continuance of the contract after default.

(D). Demand for payment was not a waiver of the default but was a notice to the bankrupt that the defendant intended to declare and claim a forfeiture.

19. The Court erred in holding that the judgment in Plumas County was founded on falsehood, collusion and fraud, in this:

(A). Even though the judgment was procured upon perjured testimony it cannot be attacked in this court, but should have been attacked in the state court by motion for a new trial. The only fraud that would vitiate a judgment would be a collateral fraud in procur-

ing the defendant in such suit to fail to appear. It is not fraud that is perpetrated upon the trial court, but is perpetrated upon a defendant to keep him from appearing in court.

We quote the following from 34 Corpus Juris, page 475, Section 741:

"The weight of authority is to the effect that there is no ground for equitable interference with a judgment in the fact that perjury was committed by such party or his witnesses at the trial, or that he suborned the witnesses and conspired with them to secure a judgment in his favor."

Hilton v. Guyot, 159 U. S. 113; 40 L. Ed. 95;

Moffatt v. U. S., 112 U. S. 24; 28 L. Ed. 623;

Fresno Estate Company v. Fiske, 172 Cal. 583; 157 Pac. 1127;

Pauson v. Weis, 144 Cal. 410; 77 Pac. 1007;

Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282;

Steen v. March, 132 Cal. 616; 64 Pac. 994;

McGehee v. Curran, 49 Cal. App. 186; 193 Pac. 277.

(B). The findings of the Superior Court in Plumas County shows that the bankrupt was in default in a sum exceeding $50,000.

See findings of the Plumas County Court, beginning page 68, paragraph 4 of Findings on page 70, Tr.

See testimony of W. E. Seehorn, Tr. page 118, as follows:

"When this suit was brought in Plumas County the company was in default in their

payments to Jenkins. I don't know just what it was. They never did make but one payment and that was $10,000. They gave him $15,000 in stock. They owed all the payments that were due at the time the suit was brought in Plumas County."

NO MERITORIOUS DEFENSE TO PLUMAS COUNTY ACTION.

(C). The Court was in error in not giving effect to the Plumas County judgment as a bar to this proceeding for the reason that no fraud in securing the judgment in Plumas County was pleaded or proven in this case. The only fraud alleged was in letting a default be taken, and the evidence was insufficient to show any fraud in procuring such default and the testimony showed that the bankrupt had no defense to the Plumas County case.

There is no allegation of any facts showing a meritorious defense to the Plumas County action the only allegations in that particular at all being mere conclusions of the pleader.

It is absolutely essential that a meritorious defense should be set up and should also be proven, neither of which were done in this action.

See the following authorities:

Parker v. Hardisty, 54 Cal. App. 628; 202 Pac. 479 at 481.

Reed v. Bank of Ukiah, 148 Cal. 96; 82 Pac. 845.

See case of *Parker v. Hardisty* at 481 of the Pacific, which reads as follows:

> "The rule is well established that in order for the plaintiffs to prevail in an action of this character, they must show, not only that the former judgment was procured by fraud, but also that they had a substantial defense to the action in which the judgment was rendered, for equity will not annul a judgment if it is a correct and just determination of the rights of the parties thereto. See Reed v. Bank of Ukiah, 148 Cal. 97; 82 Pac. 845; Parsons v. Weis, 144 Cal. 417; 77 Pac. 1007; People v. Perris Irrigation District, 142 Cal. 606; 76 Pac. 381; 23 Cyc. 1039 and 1040."

The evidence in this case shows that there was, and could be, no meritorious defense to the Plumas County action. The agreement provided for a forfeiture on the failure to make certain payments and the evidence here is that the defendants, in the Plumas County action, were in default.

Above and beyond the foregoing, it makes no difference in this case whether the Plumas County judgment was valid or invalid. It did not give Jenkins a right that he did not have before, and it did not take away from him any right that he did have before. It was simply a precautionary measure.

TIME ESSENCE OF CONTRACT—OPTION.

In an option to purchase where time is of the essence, whether by express terms or by other terms

showing that it was the intention of the parties, the optionee forfeits unless he performs punctually.

Briles v. Paulson, 170 Cal. 196; 149 Pac. 169;
Briles v. Paulson, 170 Cal. 408; 149 Pac. 804;
Compton Land Co. v. Vaughan, 33 Cal. App. 130; 164 Pac. 610.
Grey v. Tubbs, 43 Cal. 359.

13 Corpus Juris 688—Notes 45 and 46 citing many cases from practically all states in the union, and also:

Cheney v. Libby, 134 U. S. 68; 33 Law. Ed. 818;
Jennison v. Leonard, 22 Law. Ed. 539;
Emerson v. Slater, 16 Law. Ed. 360;
Slater v. Emerson, 15 Law. Ed. 626.

TIME OF THE ESSENCE—COURTS ARE BOUND TO FOLLOW SUCH PROVISIONS.

Where time is expressly declared to be of the essence of a contract regardless of the harshness thereof, courts are bound to give effect thereto, for otherwise they will be making a contract for the parties which they have not chosen to make for themselves.

Cheney v. Libby, 134 U. S. 68; 33 Law. Ed. 818 at 823.

Further, under Section 1013 of the Civil Code, State of California, the mill having been built on Jenkins' land it too became a fixture. The mill

was the property of Jenkins in the absence of an agreement to remove it, and there was no agreement for removal.

Where a vendee places improvements on land without an agreement as to removal, such improvements as are fixtures belong to the vendor on forfeiture of the agreement.

Pomeroy v. Bell, 118 Cal. 635; 50 Pac. 683;
Conde v. Sweeney, 16 Cal. App. 157; 116 Pac. 319;
Waterson v. Cruse, 79 Cal. 371-379; 176 Pac. 870.

We quote the following from the case of: *Shipler v. Potomac Copper Company* (Mont.), 220 Pac., starting at 1097. The quotation is from page 1100.

> "In 1 Washburn on Real Property, Sec. 34, the author says:
>
> ' Whether a thing which may be a fixture becomes a part of the realty by annexing it depends, as a general proposition, upon the intention with which it is annexed.'
>
> The intention mentioned in all of these authorities is not the secret intention of the person making the annexation, but the intention deducible as a presumption of law from the character of the chattel, the manner and effect of its annexation, its adaptability to the use of the realty, the purpose to which it is put, the relation of the parties, and the policy of the law (Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; Hayford v. Wentworth 97 Me. 347, 54 Atl. 940; 26 C. J. 655; 11 R. C. L.

1062), *and, in this particular instance, from the provisions of the contract.* It is significant that in concluding the agreement defendant promised, if it did not purchase the claims, 'to surrender quiet and peaceable possession of said premises and each and all of them unto the party of the first part (plaintiff) and his associates and to vacate said premises, reserving however unto itself a reasonable time within which to remove any machinery that shall have been installed therein or thereon by the party of the second part (defendant) during the term hereof.' Since the right of removal was apparently restricted to machinery alone, it is all but conclusive evidence that defendant intended that any buildings erected by it should remain."

In the case at bar both contracts contained the following provision (Tr. page 82, folio 69):

"Said party of the second part further agrees that at the expiration of said period of ten years, or on prior termination for any cause, it shall and will surrender to said party of the first part, his agent or attorney, peaceable and quietly the said lands and the whole thereof in as good order and condition, reasonable use thereof and damage by the elements excepted, as the same now are or may be hereafter put into, and not to make or suffer any waste thereof, nor lease, nor underlet, nor permit any person or persons to occupy, use or improve the same or any part thereof, excepting with the approval in writing having been first given by the said party of the first part."

In the case last cited there was simply a provision that they would surrender the premises

peaceably and quietly, and each and all of them. In the present case the contract provided that they shall surrender the premises in as good order and condition as the same now are, *or may hereafter be put into.* This is a plain and specific agreement that no matter how the contract is terminated, whether by fulfillment or forfeiture, the premises shall be surrendered to Jenkins in as good condition as they then were or might thereafter be put into, which would include all the property with which Jenkins is charged with converting.

By this agreement nothing was left to conjecture. It was a plain, specific agreement that Jenkins was to have the premises and everything that had become fixtures thereon. We may well say this was part of the consideration for the agreement.

20. The Court erred in finding that no account could be taken of the lumber and logs on hand for the reason that the value thereof was not shown by the defendant, in this:

> (A). This is an action of conversion for property alleged to have been converted by the defendant. The testimony shows that everything on the lands constructed of lumber was made from the timber standing on the lands of defendant. There was no duty on the defendant to show the value of the timber. It was defendant's own timber. He was the owner of it, and there is no way in which its value could be material. In order to get a judgment for conversion it was incumbent upon the plaintiff

to show the value of the timber, and that it was their timber.

See Testimony of W. E. Seehorn, Tr. page 118, folio 97, pages 119-120.

Jennison v. Leonard, 88 U. S. 302; 22 L. Ed. 539.

CONTRACT FOR SALE OF TIMBER TO BE PAID IN INSTALLMENTS AS TIMBER IS CUT.

The purchaser cuts considerable timber but fails to make certain payments when due, and the owner declares a forfeiture for failure to make such payments, and also takes possession of the land and timber, including the timber that is cut—the assignee of the purchaser afterwards seizes the cut timber and is sued for conversion thereof, and the Supreme Court of the United States held that he was liable. Among other things it held that under such a contract the owner could declare a forfeiture for failure to pay on time and on such forfeiture was entitled to be restored to his property, *without any express provision of re-entry,* and upon such restoration he was entitled to the timber that was cut but not paid for.

Jennison v. Leonard, 22 Law. Ed. 539.

Under the rule in the Jennison v. Leonard case, supra, Jenkins undoubtedly was entitled to a forfeiture, and in such forfeiture was entitled to the improvements, such as the mill and machinery, and

was also entitled to all lumber on the premises which were cut from the lands involved in the contract, and which lumber had not been paid for, according to the provisions of the contract. (See Tr. page 79.)

21. The Court erred in finding that the evidence was ample to show that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property on the premises to the value of $50,000, in this:

(A). The mill, under the laws of the State of California, belonged to Jenkins, it having been placed on his land without an agreement to move it.

See authorities cited under the foregoing Assignments.

(B). The mill was constructed out of lumber sawed from the timber of the defendant, and for which no price was paid.

See authorities cited under Assignment 20, B, *ante*.

(C). Defendant did not sell anything but the mill.

Jenkins never took possession of anything but merely sold the mill and such property as was his to B. C. Soule, and the description of the property contained in the bill of sale to Soule is as follows:

"1 certain sawmill, engine and boiler heretofore known and described as the McCollum-

Christy Lumber Company Mill in Grizzly Valley in said County and State, together with—

All personal property, appliances and kitchen furniture in the bunk houses on said premises *now owned* by the said Rees T. Jenkins." (Tr. page 58, folio 49.)

See testimony of N. J. Barry (Tr. page 145).

"After that was agreed to there was some talk about other property out there. You will notice in that agreement there was a space left at the bottom for some extra writing. I always leave a space at the bottom of an agreement, so that if there is anything else we won't have to re-write it; we can put it in; you will notice that there is written in there the language as to the personal property he conveyed out there, everything that was owned by Jenkins. The reason for this was: I told them there was a lot of stuff that didn't belong to Jenkins, that all that he claimed was the fixtures, that is, if there were cabins there, the cabins would go; if there was a range there, or anything fastened to the ground, those would be fixtures; but if there was a wagon, and logging equipment, and other things out there that were loose, that those did not belong to Jenkins."

(D). The testimony fails to show that defendant ever had in his possession, or exercised any dominion over, any property upon the premises other than the selling of the mill.

(E). The testimony fails to show that the trustee in bankruptcy ever made any attempt to take possession of the personal property or the mill, or ever made any demand on the defendant, or anyone else, for any property which belonged to the bankrupt.

(F). That the mill building was permanently affixed to the soil, and that the mill, machin-

ery, boiler, engine and other equipment was permanently attached to the mill building, or to things otherwise permanently affixed to the soil, and under the Statute of the State of California, this made the mill, the mill machinery, boiler, engine and equipment a part of the realty, and became the property of the defendant the instant it was so affixed, both under the law and under the contract.

(G). There was no competent testimony showing the value of any property belonging to the bankrupt.

22. The Court erred in finding for plaintiff and against defendant in amount $50,000 with legal interest from June 23, 1922 and costs, in this:

(A). There was no testimony that defendant ever converted or had in his possession any property that was the property of the plaintiff.

(B). There is no competent testimony that any property of the plaintiff, involved in this action, was of the value of $50,000 or any other value.

It is respectfully submitted that the judgment rendered must, in justice and equity, be reversed.

Dated, San Francisco,
May 18, 1925.

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